BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROI G. REYES	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,042
GOLDEN PLAINS HEALTH CARE	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the March 4, 2002 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on August 21, 2002. Gary M. Peterson of Topeka, Kansas, was appointed and participated in this appeal as Board Member Pro Tem.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that she aggravated a preexisting compression fracture in her back while working for respondent from November 4, 1998, through April 28, 1999. In the March 4, 2002 Award, the Judge determined that claimant had (1) injured her back at work as alleged, (2) provided respondent with timely notice of the low back injury and (3) sustained a 15 percent whole body functional impairment as a result of that injury. Furthermore, the Judge determined that claimant's award should not be reduced for a preexisting functional

impairment. Accordingly, the Judge awarded claimant a 15 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Moore erred in finding them liable for claimant's benefits. They argue claimant had a long history of back problems, which worsened over a period of years due to repetitive micro-traumas. They argue that claimant's date of accident should be the last day that claimant worked as a certified nurses' aide. Accordingly, respondent and its insurance carrier argue the appropriate date of accident is May 9, 1999, as claimant allegedly performed similar work for another employer on May 7, 8 and 9, 1999, after she last worked for respondent on April 28, 1999. Consequently, respondent and its insurance carrier argue that a subsequent employer is responsible for any workers compensation benefits due under this claim.

Respondent and its insurance carrier also contend the Judge erred in finding that claimant provided respondent with timely notice of the low back injury. And finally, they contend the Judge erred in failing to reduce claimant's award by five percent for her preexisting whole body functional impairment.

The issues before the Board on this appeal are:

1. Is claimant entitled to receive workers compensation benefits from respondent and its insurance carrier for a repetitive micro-trauma injury when claimant left respondent's employment and performed similar work for another employer for two or three nights?

2. If so, did claimant provide respondent with timely notice of her back injury?

3. If so, should claimant's award be reduced for preexisting whole body functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the Award should be modified to reduce claimant's permanent partial general disability by the five percent whole body functional impairment that preexisted the aggravation and injury claimant sustained to her back from the work that she performed for respondent.

Claimant began working for respondent as a certified nurses' aide (CNA) on approximately November 4, 1998. Claimant, who has a long history of back problems stemming from 1983, began having increased back problems in January or February 1999,

when her workload increased due to personnel shortages. On February 11, 1999, claimant sought medical treatment from Dr. Lee R. Dorey.

Dr. Dorey placed medical restrictions on claimant. And when claimant presented those restrictions to her supervisors, respondent modified claimant's job duties by placing her in its Alzheimer's unit, which claimant described as somewhat easier work. Claimant continued to work for respondent through April 28, 1999. According to claimant, she left respondent's employment because she could not perform her assigned duties. Claimant testified, in part:

> Q. (Mr. Townsley) All right. Now, when we get to April 28th, what is it that happened that day that made you say I just can't work here any more?
>
> A. (Claimant) I do believe that was the day after -- the day of facet block joint or nerve block joint in my back. And I went in, I was hurting pretty bad, they wanted me to come to work anyway, I did. I had asked them about working a shift where, the night shift, they said, no, and I'm not going to lie, I was high on morphine, too, because they had gave me that when they gave me the shots in my back. And I went in to pick a woman up, I couldn't do it, I got upset, I started crying, I left.[1]

After leaving respondent's employment, claimant tried working for another employer, Oakwood Rehabilitation, on May 8 and 9, 1999, as a night CNA, which claimant described as much easier work than that which CNAs regularly perform. But claimant found she could not do even that easier job and resigned. Later, claimant found a job as a chemical dependency technician.

After treating claimant for several months, Dr. Dorey referred claimant to an orthopedic surgeon. The orthopedic surgeon first saw claimant in July 1999 and two months later, in September 1999, the surgeon operated on claimant's back, including a T11-12 diskectomy, a posterior T10-11 instrumented fusion with Moss cage and buttress plate and a right hemilaminectomy. But claimant experienced significant pain following that surgery and in late December 2000 another surgeon operated on her back and removed some of the hardware from the first surgery.

1. What is the date of accident for this repetitive micro-trauma injury?

Following creation of the bright line rule in the 1994 *Berry*[2] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In

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[1] R.H. Trans. at 34-35.

[2] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Treaster,[3] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[4]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[5]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

The Board affirms the Judge's finding that claimant injured her back while working for respondent. At page 7 of the Award, the Judge stated, in part:

> Here, Claimant had a pre-existing compression fracture at T12. It was symptomatic in the sense that she had chronic pain. However, she was able to work as a CNA until February 16, 1999. Respondent does not dispute that CNA work is physically stressful and demanding. Nor does Respondent dispute Claimant's contention that she had to work harder in January and February, 1999, due to staffing changes. This increased level of activity clearly precipitated a significant and permanent increase in Claimant's low back symptoms. It is well-established that an accidental injury is compensable where the accident serves only to aggravate or accelerate an existing disease or intensifies the affliction. . . .

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[3] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[4] *Id.* at Syl. ¶ 3.

[5] *Id.* at Syl. ¶ 4.

A strong case can be made that the appropriate date of accident for purposes of computing claimant's workers compensation benefits for the series of micro-traumas in question should be February 16, 1999, when respondent removed claimant from her regular CNA duties to an activities position, where she primarily entertained and interacted with the residents. On the other hand, a strong case is made that claimant's last day working for respondent on April 28, 1999, should be the designated date of accident for this series of accidental injuries as claimant testified she ultimately left respondent's employment due to her back injury and her inability to physically assist the residents when she was occasionally required to perform that activity after her transfer to lighter duties. Moreover, claimant testified that in the limited time she worked for Oakwood Rehabilitation her job duties were considerably easier than the regular CNA duties that she performed for respondent as she worked the night shift. Additionally, claimant believes that she only worked two nights for Oakwood Rehabilitation.

Nonetheless, whichever accident date is used, the Board finds that the Judge appropriately determined that respondent and its insurance carrier were responsible for claimant's workers compensation benefits. The greater weight of the evidence indicates that claimant was physically capable of performing the duties of a CNA when she began working for respondent but she had lost that ability by late April 1999 when she left claimant's employment. Furthermore, as indicated below the greater weight of the medical evidence establishes that claimant's micro-trauma injury occurred before she left respondent's employment.

Respondent and its insurance carrier hired Dr. Chris D. Fevurly to evaluate claimant for purposes of this claim. Dr. Fevurly, who saw claimant in early April 2001, believed that the work that claimant performed for respondent through April 1999 had aggravated a preexisting T12 compression fracture. That opinion was based upon claimant's history that she performed repetitive bending and heavy lifting working for respondent. The doctor's April 11, 2001 letter to respondent's insurance carrier contains the following history:

> She [claimant] was there [at respondent's] for about 6-12 months before she suffered the work related low back injury. She stated that this began when she performed repetitive bending, stooping, and heavy lifting. She was responsible for 18 "total care patients" that required her to work between 40-60 hours per week. It was in the process of this repetitive bending, stooping, and lifting that she developed more severe low back pain.

According to Dr. Fevurly, claimant had a 15 percent whole body functional impairment when she left respondent's employment and that functional impairment rating did not change due to the work that she performed for Oakwood Rehabilitation.

> . . . I would say that if -- if you're asking me did she have a 15 percent impairment when she left the employment at Golden Plains [respondent], I'd say yes, and did she have a 15 percent impairment which *[sic]* she left this other employer [Oakwood Rehabilitation], the answer to your question would be yes.[6]

Dr. Pedro A. Murati, who examined claimant at her attorney's request in late June 2001, diagnosed low back pain status post posterior instrumented fusion from T10-L1 utilizing iliac crest bone graft and an L2-3 hemilaminectomy and cyst removal. When asked whether claimant's limited work on the night shift at Oakwood Rehabilitation caused claimant any additional permanent injury or permanent impairment, Dr. Murati indicated that it did not. The doctor testified, in part:

> Q. (Mr. Mann) Doctor, to be a little more specific about my client's subsequent work activities, as best I can understand it after April 28th, 1999 she worked three night shifts for a subsequent nursing home. Her testimony was that on the night shift there was very little lifting required of her because, of course, the residents were asleep. The idea in taking that job is she felt that she could physically handle it but she was in so much pain that she discontinued that job after a short period of time. With that additional history and assuming that that's a true and correct rendition of her testimony and the testimony in the record, do you believe that the subsequent three days of work activities on night shift would have resulted in any additional permanent injury and aggravation other than what already existed as a result of her injuries at Golden Plains [respondent]?
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> A. (Dr. Murati) Yes, assuming your statement to be correct, it would not amount to a significant aggravation.[7]

Dr. Lee R. Dorey also provided his medical opinion whether claimant sustained additional injury working for Oakwood Rehabilitation. Assuming claimant's job duties at Oakwood Rehabilitation did not require her to lift or bend more than what would be required doing normal activities of daily living, Dr. Dorey did not believe that job would have significantly aggravated claimant's back. The doctor testified, as follows:

> Q. (Mr. Mann) In your opinion, if you assume the history that I gave to you today of performing two days of night shift work on May 8th and May 9th of 1999, which did not involve, as I understand it, any lifting or transferring of patients and very little bending, would that in any way materially have affected her mechanical back failure in the whole scheme of this claim?

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[6] Fevurly Depo. at 20.

[7] Murati Depo. at 16.

> Mr. Townsley: Object to form.
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> A. (Dr. Dorey) As I've just said in my last statement, this is a matter of degree. If the person was not doing repetitive bending and lifting any more than she would be doing in normal activities of daily living, then I do not think that it would materially have aggravated her mechanical back failure.[8]

Considering the entire record, the Board concludes that claimant aggravated the compression fracture in her back while working for respondent through April 28, 1999. Furthermore, the Board concludes that the work that claimant performed after April 28, 1999, did not significantly contribute to her condition.[9] Accordingly, respondent and its insurance carrier are responsible in this claim.

2. Did claimant provide respondent with timely notice of her back injury?

That issue was presented to the Board in an earlier appeal from a preliminary hearing order that was entered in this claim. In a March 28, 2000 Order, the Board made detailed findings and conclusions, which it now adopts for purposes of this appeal. Accordingly, the Board concludes claimant provided respondent with timely notice of her back injury.

The greater weight of the evidence establishes that claimant advised her supervisors before she left respondent's employment in April 1999 that her work activities were causing her increased back pain. Consequently, respondent was placed on reasonable notice that claimant had sustained a work-related injury.

> When dealing with injuries that are caused by overuse or repetitive micro-trauma, it can be difficult to determine the injury's cause. It is also often difficult to determine the injury's date of commencement and conclusion. In those situations, injured workers should not be held to absolute precision when considering the requirements of notice and written claim. The test should be whether the employer was placed on reasonable notice of a work-related injury. . . .[10]

Not only was claimant's situation complicated due to the insidious nature of her injury, it was further complicated as her injury comprised an aggravation of a preexisting symptomatic condition, the compressed fracture of a thoracic vertebra.

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[8] Dorey Depo. at 45.

[9] See *Condon v. Boeing Co.*, 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

[10] *Pope v. Overnite Transportation Company*, No. 237,559, 1999 WL 557550 (Kan. WCAB June 29, 1999).

When considering the entire circumstances, the Board concludes that claimant's various conversations with her supervisors satisfied the requirement to report her injury within 10 days.[11]

3. What is claimant's functional impairment?

The Board affirms the Judge's finding that claimant now has a 15 percent whole body functional impairment as the result of the injury that she sustained while working for respondent. The Judge adopted the 15 percent whole body functional impairment rating provided by Dr. Fevurly over the 36 percent whole body functional impairment opinion provided by Dr. Murati. The Board finds no reason to modify that finding.

4. Should claimant's permanent partial general disability be reduced due to a preexisting functional impairment from the compressed fracture to her vertebra?

As provided by the Workers Compensation Act, a worker may only recover an award for increased impairment or disability.[12] The Act provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The medical evidence is uncontradicted that before claimant began working for respondent she had a compressed fracture in a thoracic vertebra, which comprised a five percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, according to both Drs. Fevurly and Murati. Dr. Dorey did not provide an opinion regarding either claimant's present functional impairment or her preexisting impairment. And claimant in her January 4, 2002 submission letter to the Judge conceded that claimant had a preexisting five percent whole body functional impairment as that figure was used in requesting an award for a 20.5 percent permanent partial general disability.

This is a claim for permanent partial general disability benefits based upon claimant's whole body functional impairment. A work disability is not requested. Accordingly, in determining claimant's award the 15 percent permanent partial general

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[11] See K.S.A. 44-520 (Furse 1993).

[12] K.S.A. 1998 Supp. 44-501(c).

disability should be reduced by the preexisting five percent whole body functional impairment. Consequently, the March 4, 2002 Award should be modified.

The Board adopts the findings and conclusions set forth in the March 4, 2002 Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the March 4, 2002 Award and reduces claimant's permanent partial general disability from 15 percent to 10 percent.

Troi G. Reyes is granted compensation from Golden Plains Health Care and its insurance carrier for an April 28, 1999 accident and resulting disability. Based upon an average weekly wage of $371.88, Ms. Reyes is entitled to receive 81.57 weeks of temporary total disability benefits at $247.93 per week, or $20,223.65, plus 34.84 weeks of permanent partial general disability benefits at $247.93 per week, or $8,637.88, for a 10 percent permanent partial general disability, making a total award of $28,861.53, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director